FEDERALLY SPEAKING

by Barry J. Lipson

Number 27

Welcome to **Federally Speaking,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 27th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm.

U.S SUPREME COURT UPDATE:

"GREAT THEATER AND LOTS OF FUN." The Pittsburgh Federal Courthouse hosted the comprehensive all-day Federal Bar Association West Penn Chapter/Duquesne Law School U.S. Supreme Court Update on March 12, 2003, featuring U.S. Supreme Court Clerk William Suter, Major General, US Army JAGC (Ret.), not to be confused with U.S. Supreme Court Justice David Souter, who had joined the Court only the year before General Suter came aboard in 1991. "We get 8,000 petitions filed a year, and a lot are frivolous, but it says 'Equal Justice for All' on the courthouse and we believe that," Suter advised. A little over "three percent of the 2,000 paid petitions," that is petitions filed by law firms or governmental bodies, are granted each year, and of the other 6,000 ***'pro se style"*** petitions, "only about 0.2 percent are granted," totaling about 80 written opinions a year. Most cases heard involve important federal questions or conflicts between the Circuits. The importance of this historic event, where for the first time in Pittsburgh twenty Western Pennsylvanians were sworn-in to the U.S. Supreme Court by the nineteenth "Clerk of Court" (the first having been appointed in 1790), was not lost on the Pittsburgh press. The Post-Gazette reported that "Suter, known as an entertaining speaker," noted "among his many observations … that the media has mislabeled the Court as arch-conservative when he said the five justices most often identified as right-wingers are often 'all over the place' in their opinions on cases. He said he views the Court as moderate." The Tribune-Review, in addition to listing the names of all admitees, reported on Suter offering "amusing anecdotes on the serious subjects covered by the Court," including his observation that "oral arguments before the Justices are 'great theater and lots of fun,'" and his concluding with an invitation to the lawyers present to arrange a Supreme Court tour for them, the apex of which would be "the secret basketball court on the top floor --- 'the highest court in the land'." Presenters U.S. Court of Appeals Judge D. Brooks Smith, U.S. Attorney Mary Beth Buchanan, ACLU Legal Director Witold (Vic) Walczak, Duquesne Law Professor and Program Chair Ken Gormley, Pitt Law Professor John Parry, Columnist and Event Chair Barry J. Lipson, and Supreme Court practitioners Harry Litman and Thomas McGough, together with U.S. District Clerk Bob Barth's "crying" the Court in, and Chief U. S. District Judge Donetta Ambrose's remarks, made this a most memorable major jurisprudential event. We are most pleasantly pleased that for the proper processing of the proliferating ***suits*** and ***cases*** filling the **Supreme Court's** files, our **Highest Court** is a ***"Two-Suiter."***

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UNPRECEDENTED "CERT" PETITION **Congress** established the **U.S. Foreign Intelligence Surveillance Court** (the **FISA Court**) to in secret review, permit and limit, as necessary, first "electronic surveillance" (50 USC §1803), and then "physical search" (50 USC §1822(c)), conducted in the name of "national security;" and even provided for a partial, if not "impartial," appellate process. Thus, the **FISA Review Court**, which is comprised of three judges "publicly" designated by the Chief Justice from the U.S. district courts or courts of appeals, one of whom has been "publicly" designated by the Chief Justice as the Presiding Judge, sit "together" as "a court of review which shall have jurisdiction to review the ***denial*** of any application made under this chapter. If such court determines that ***the application was properly denied***, the court shall immediately provide for the record a written statement of each reason for its decision and, ***on petition of the United States*** for a **Writ of Certiorari**, the record shall be transmitted under seal to the **Supreme Court**, which shall have jurisdiction to review such decision" (emphasis added). But what if the United States is not denied its "snooping" application to, for example, bug Snoopy's doghouse? Who may then appeal? Not Snoopy! Not Peanuts! Not anyone! So appears to say **Congress** by its **s**ilence on this issue. But is this the American way? The ACLU, the National Association of Criminal Defense Lawyers, the American-Arab Anti-Discrimination Committee, and the Arab Community Center for Economic and Social Services, think not! They believe the **FISA Court of Review's** overturning of the unanimous decision of seven (7) other Federal Judges (later joined by an eighth) forbidding "law enforcement officials" from "directing or controlling … the use of the **FISA** procedures to enhance [non-espionage] criminal prosecution" should itself be overturned (see ***Federally Speaking, Nos. 20 & 24;*** see also 50 U.S.C. 1801, et seq), and have filled with the **U.S. Supreme Court** a "**Motion to Intervene as a Party**" and a "**Petition for Writ of Certiorari**," both unprecedented (and un-provided for by **FISA**). If the **High Court** grants their **Motion to Intervene**, they will become parties and presumably may appeal. If not, it is the ACLU's position that under the **All Writs Act**, 28 U.S.C. § 1651(a), which provides that the **Court** "may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," the **Supreme Court** should still hear this appeal. The **U.S. Supreme Court** has already **"**cautioned that the threat to society is ***not*** dispositive in determining whether a search or seizure is reasonable" (***City of Indianapolis v. Edmond***, 531 U.S. 32 (2000))," and how can they resist explaining the **constitutionality,** or lack thereof, of the **FISA Review Court's** novel "***come close***" rule? (That **Review Court** found that as "the procedures and government showings required under **FISA** … ***come close***" to meeting "the ***minimum Fourth Amendment warrant standards*** … **FISA** as amended is **constitutional** because the surveillances it authorizes are reasonable.") Emphasis added. How can the **High Court** turn down such an opportunity for "great theater and lots of fun"? Snoopy again challenging his "Red Baron" here, and the Earl of Ash's crofters defending croftly national security!

"DEFERENCE" NOT "ABDICATION" SAYS HIGH COURT! "Deference does not by definition preclude relief. … Even in the context of **Federal habeas**, deference does not imply abandonment or abdication of judicial review." So wrote Justice Kennedy in a **U.S. Supreme Court** opinion in which Rehnquist, C. J., and Stevens, O'Connor, Scalia, Souter, Ginsburg, and Breyer, JJ., joined; Scalia, J., filed a concurring opinion; and only Thomas, J., dissented**.** ***Miller-El v. Cockrell***, 123 S. Ct. 1029; 154 L. Ed. 2d 931(2003). This was the **High Court's** reaction to the **Fifth Circuit's** application of the provision of the **Antiterrorism and Effective Death Penalty Act of 1996**, requiring a presumption that state court findings are correct without a determination that the findings would result in a decision which was unreasonable in light of clear and convincing evidence (28 U.S.C. §2254(d)(2)), in denying a petition for a 28 U.S.C. §2253 **Certificate of Appealability (COA)**. According to the **Supreme Court**, the **COA** inquiry does not require full consideration of the factual or legal bases supporting the claims. The prisoner need only demonstrate "a substantial showing of the denial of a **constitutional** right" (28 U.S.C.§2253(c)(2)), and he satisfies this standard by demonstrating that reasonable jurists could disagree with the **District Court's** resolution of his case or that they would find the lower courts' assessment of the **constitutional** claims to be "debatable." In

Miller-El, where the Dallas County prosecutors used peremptory challenges to exclude 10 of the 11 African-Americans eligible to serve on the jury in this capital murder trial, the **High Court** found the debate as to whether the prosecution acted with a race-based reason when striking prospective jurors was raised by a number of issues, including the statistical evidence demonstrating that 91% of the eligible African-Americans were excluded; by the evidence of the State's use of racially disparate questioning; and by the state courts' failure to consider the historical evidence of racial discrimination by the Dallas County District Attorney's Office. Indeed, Justice Kennedy pointedly advised that: "Our concerns here are heightened by the fact that, when presented with this evidence, the state trial court somehow reasoned that there was not even the inference of discrimination to support a ***prima facie*** case." Thus, the **Supreme Court** seemed quite displeased by the lower Federal courts' "abdication," without question, to the state court's evaluation of the demeanor of the prosecutors and jurors in the Miller-El trial, their excessive deference to the prosecutors' denial of racial motives in jury selection, and their failure to consider the admittedly "massive" evidence presented on behalf of Miller-El.

RICO PEAKO'ED? Has RICO reached its apex? In Chapter 28 of ***Advising Small Businesses*** your columnist in 1998 reported that the "**Racketeering Influenced and Corrupt Organizations Act (RICO)** claims are being used more and more in conjunction with antitrust claims in private antitrust actions" (18 U.S.C. §1962). While **RICO**, which greatly expands the penalties available for other crimes such as for extortion under the **Hobbs Act**, was originally enacted to combat organized crime such as the Mafia, it has been widely expanded into non-organized crime (in the traditional sense) areas, and "white collar" areas such as antirust, securities fraud, etc. Thus, Justice Ginsburg, in her concurrence in ***Scheidler v. National Organization For Women, Inc.,*** 123 S. Ct. 1057; 154 L. Ed. 2d 991 (2003), advised "**RICO,** which empowers both prosecutors and private enforcers, imposes severe criminal penalties and hefty civil liability on those engaged in conduct within the Act's compass. … It has already 'evolved into something quite different from the original conception of its enactors,' ***Sedima, S. P. R. L. v. Imrex Co.,*** 473 U.S. 479, 500, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985), warranting 'concerns over the consequences of an unbridled reading of the statute,' ***id***., at 481.The Court is rightly reluctant, as I see it, to extend **RICO's** domain further by endorsing the expansive definition of 'extortion' adopted by the **Seventh Circuit**." In ***Scheidler*** the **Supreme Court** held that even though the abortion opponents' activities were criminal and deprived the abortion supporters of their ability to exercise their property right to lawful abortions, such deprivation did not by itself constitute extortion within the meaning of the **Hobbs Act** since the opponents did not obtain any property from the supporters they could exercise, transfer, or sell and, therefore, there was no **RICO** violation. The ACLJ "praise God for this TREMENDOUS VICTORY" and advises this "decision precisely reflected our argument that pro-life protestors cannot be liable for 'extortion' and 'racketeering' - like the drug dealers or organized crime for which **RICO** was created." Whether this 8-1 decision actually reflects a reluctance to label "right to lifers" as racketeers, or heralds a braking of the upward spiral of **RICO**, remains to be seen.

SEVENTY-SEVEN DAYS TOO LATE! Seventy-seven days ***after*** Texas executed Leonard Rojas by lethal injection, Judge Price of the Court Of Criminal Appeals Of Texas, "**On Motion To Protect Applicant's Right To Federal Habeas Review**," in ***Ex Parte Leonard Uresti Rojas,*** No. 39,062-01(2/12/03), filed a statement dissenting to the denial of the **Motion to Protect Applicant's Federal Habeas Review**, in which Johnson and Holcomb, J.J., joined. How did this happen? According to Judge Price, this "Court should have granted relief to the applicant because it appointed an attorney who should not have been appointed to represent a capital defendant in his one opportunity to raise claims not based solely on the record. … We appointed counsel to file an application for writ of habeas corpus under Texas Code of Criminal Procedure … We denied relief without written order December 9, 1998. … The one-year statute of limitations for filing a petition for **Federal habeas** relief under the **Antiterrorism and Effective Death Penalty Act** began February 2, 1999. See 28 U.S.C. § 2244(d) (1999). … Once habeas relief was denied by this Court, habeas counsel failed to take ***any*** action to preserve the applicant's right to **Federal habeas** review. Indeed, he did not even notify his client that the Court had denied relief in his case. He claims he was unaware that he was

responsible for filing in **Federal District Court** for the appointment of counsel or a motion to substitute counsel. As a result of habeas counsel's omission, the applicant's **Federal habeas** petition was not heard on the merits. The **Federal District Court** that reviewed the applicant's **Federal petition** denied relief on the basis that the petition was filed too late. ***Rojas v. Cockrell,*** No. 3:00-CV-0716-D (N.D. Tex. 9/6/01). The **Fifth Circuit** panel that reviewed the applicant's case affirmed on the same basis. ***Rojas v. Cokrell,*** No. 01-11204 (5th Cir. 6/7/02), ***cert. denied***, 71 U.S.L.W. 3351 (11/18/02). The facts of which the Court should have been aware when it appointed **habeas** counsel show that counsel was not competent to represent the applicant in this case. The attorney we appointed to represent the applicant had received two probated suspensions from the State Bar of Texas." Another case of irreversible error?

FOLLOW-UP

BY ZEUS, THEY LET IT STAND! The **U.S. Court of Appeals for the Ninth Circuit** has let stand the 2-1 decision of its three-judge panel that the phrase **"under God"** ***in public school recitations of the Pledge of Allegiance*** **is unconstitutional [that's *all* that was decided],** by declining ***en banc*** to rehear ***Newdow v. U.S. Congress*** (292 F. 3d. 597 (9th Cir. 2002); see ***Federally Speaking,*** No. 18). The historical prospective is that there was no **Pledge of Allegiance** until 1892, when socialist clergyman and editor Francis Bellamy wrote for ***The Youth's Companion*** the original "Godless" generic **Pledge of Allegiance**: "I pledge allegiance to my flag and to the Republic for which it stands: one nation, indivisible, with liberty and justice for all." (The word Bellamy really wanted to add, but was dissuaded from, was "**equality**" not "**God**.") Sixty-two years later, during the era of the Cold War and McCarthyism, Congress inserted "under God" (but not "equality") into the Pledge, primarily through the efforts of the Knights of Columbus, a Catholic men's club, to distinguish the Pledge from similar rhetoric used by the so-called "godless communists." According to the Panel's opinion, written by Circuit Judge Alfred T. Goodwin, which the full **Ninth Circuit** let stand**,** inserting "under God" is as **unconstitutional** as inserting "we are a nation `under Jesus,' a nation `under Vishnu,' a nation `under Zeus,' or a nation `under no god,' because none of these professions can be neutral with respect to religion," and, therefore, would be a government endorsement of religion in violation of the **First Amendment**. According to Susan Jacoby of ***Newsday***, at the 1787 Constitutional Convention our founding fathers extensively debated using the word "God" in the **U.S. Constitution** "and the secularists prevailed." But, by Zeus, we await hearing from the **U.S. Supreme Court**, pending which the **Circuit Court** has stayed its **Order** dropping "under God" in Public School recitations.

POSTSCRIPT. Confused by this column's literary allusions to the "Earl of Ash," and his "crofty" ways? Your imaginations are, of course, free to make what you will of these verbal pictures. However, according to Webster, an "Earl" is a member of the third grade of the British peerage, similar, I guess, to an Executive Branch Cabinet Secretary (President, Vice President, Cabinet Secretary); an "Ash" is a tough-wooded tree with furrowed bark and pinnate leaves; and "crofts" are small enclosed fields or farms worked by "crofters" (and sometimes referred to as "creeps," which are enclosures only young animals can enter). Also, while not used as such in this column, "crafty's" definitions range from "skillful, ingenious" to "guileful, wily." What does all this mean here? Why, that such peer is of Cabinet Secretary rank, heading a tough, wrinkled, symmetrical fiefdom, who's walled fields are worked skillfully, ingeniously, wily and with stratagem. What more could the Earl want from any observer or, indeed, from his own Justice Department crofters?

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You may contact columnist Barry J. Lipson, Esq., FBA Third Circuit Vice President, at the Law Firm of Weisman Goldman Bowen & Gross, 420 Grant Building, Pittsburgh, Pennsylvania 15219-2266 (412/566-2520; FAX 412/566-1088; E-Mail blipson@wgbglaw.com). The views expressed are those of the persons they are attributed to and are not necessarily the views of the FBA, this publication or the author. *Back issues are available on the United States District Court for the Western District of Pennsylvania website:* (http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm).